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Supreme Court, U.S.
FILED
DEC 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

In The Supreme Court Of The United States

OCTOBER TERM, 1987

RAYMOND STOKES, PETITIONER

v.

THE UNIVERSITY OF TENNESSEE AT MARTIN, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

HARRY MAX SPEIGHT
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Attorney For Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. If the State of Tennessee decisions which grant the Respondent immunity under sovereign immunity are allowed to stand, Petitioner could never have a forum to protect his Constitutional rights under the Fourteenth Amendment.

2. Does the Personnel Policies and Procedures Manual of the Respondent create a protected property right under the Fourteenth Amendment to the United States Constitution that will be effective as to an entity otherwise protected by the doctrine of sovereign immunity?

3. Can Respondent disregard its own Personnel Policies and Procedures Manual, and not violate the principles of due process under the Fourteenth Amendment to the United States Constitution?

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STATEMENT OF JURISDICTION

On September 8, 1987, the Supreme Court of Tennessee entered an Order denying Raymond Stokes, the Petitioner herein, his Application for Permission to Appeal. That Application had been filed seeking an appeal to reverse the decision of the Court of Appeals of Tennessee, Western Section, and its Order entered June 19, 1987, which upheld the trial court's granting of a Motion for Summary Judgment. The Court of Appeals had affirmed that Petitioner's action was barred by sovereign immunity.

Petitioner has raised the issue of due process under the Fourteenth Amendment to the United States Constitution at every stage of the proceedings.

Petitioner believes that jurisdiction of this cause is before the Court by virtue of 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The primary Constitutional provision which this case involves is Amendment 14, Section 1, of the United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After more than sixteen (16) years of continuous employment with The University of Tennessee at Martin, and also within approximately three (3) years of retirement, Petitioner received a letter from his immediate supervisor, dated November 29, 1983, stating that his employment as Associate Director of Financial Aid would be terminated. The letter, without further explanation or comments, stated:

> "Despite previous written and verbal warnings your inadequate work performance has continued. Therefore, it is my decision to terminate your employment effective December 31, 1983."

Petitioner was later informed that his termination was designated as code number 205 under the Personnel Policies and Procedures Manual in force, (hereafter called Manual), which Manual had been prepared for use by Respondent in employee matters. Under the Manual, this termination was for "cause"[1], and required that "additional written explanation" was to be given.

The Manual did not permit a pre-termination hearing or a post-termination hearing for this type of discharge, but permitted Petitioner to "appeal" the discharge in writing through the normal "chain of command". Each person reviewing the "appeal" would give a written response.[2]

Petitioner's attorney wrote to Respondent seeking a specific description of charges constituting "inadequate work performance" and also requesting a "stay" of discharge pending the "appeal". These requests were denied, with the exception that Petitioner was informed that he could examine

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[1]The full text of applicable section is printed on Page 22 of Appendix.

[2]If an employee is discharged for acts of dishonesty, the Manual grants him a post-termination hearing.

his personnel file and some other file that his immediate supervisor had.

Petitioner then attempted to "appeal" his discharge by filing his affidavit, with exhibits consisting primarily of his employee evaluations and letters of recommendation. His affidavit generally claimed that he had done what he was required to do; that the problems between him and his immediate supervisor were personal, based mostly on Petitioner's refusal to approve questionable loans, and that until 1983 he had always received good employee evaluations. No counter-affidavits or other written responses were filed by anyone in opposition.

The "appeal" was reviewed by the Office of Academic Affairs, the Dean of Admissions and Records, and the Chancellor of the University. All affirmed the discharge, although none specified what areas were inadequately performed by Petitioner that justified a discharge.

Petitioner, on May 18, 1984, filed a Complaint in the Weakley County, Tennessee, Chancery Court against the Respondent, seeking a reinstatement of his employment, benefits, backpay and attorney fees. The Complaint was subsequently amended, and the Complaint, as amended, raised federal questions consisting of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and also the provisions of 42 USC 1983.[3]

Respondent filed a Motion for Summary Judgment, alleging that the action was barred by the doctrine of "sovereign immunity"; that the Complaint failed to state a claim for which relief could be granted, (a) claiming immunity to suit under 42 U.S.C. 1983; (b) claiming that Petitioner did not have protected property or liberty interest; and (c) claiming that it fully abided by its own rules.

[3]Copy of pertinent portion of Complaint found on Page 23 of Appendix.

The Chancery Court granted the Motion on the grounds of sovereign immunity, which Order was entered October 20, 1986. This decision was timely appealed to the Court of Appeals for Tennessee, Western Section, which on June 19, 1987, affirmed the ruling of the Chancery Court on the sovereign immunity issue only. Petitioner timely filed his Application For Permission To Appeal to the Supreme Court for the State of Tennessee, which application was denied on September 8, 1987.

Although such were not addressed by the Court of Appeals and the Tennessee Supreme Court, Petitioner has continued to raise the federal questions throughout his appeals.

ARGUMENT

The Respondent has to this point been able to shield itself behind the doctrine of "Sovereign Immunity" and not have to provide Petitioner the rights protected by the United States Constitution, specifically including the Fourteenth Amendment.

Because of the ever present possibility of abuses to others as well as this Petitioner, and the need to secure settlement of important questions of law, especially as it applies to an "arm" of the State of Tennessee and the conflict with Constitutional guarantees, this Petition should be granted.

If the decisions of the Courts below are allowed to stand, Petitioner could never have a forum to protect his Constitutional rights.

As discussed in other portions of this Petition, Petitioner relies on the Personnel Policies and Procedures Manual, prepared and published by Respondent, and the due process rights which it creates. Such rights are not created by an "express contract", but rather an "implied" contract.

The Tennessee Court of Appeals determined that Article I, Section 17[4] of the Tennessee Constitution permits suits against the State only as the Legislature may direct; that with the exception permitted at the time this lawsuit was first filed, actions against the State and the University of Tennessee were prohibited under Tennessee Code Annotated 29-10-101[5] and 20-13-102[6]. Petitioner has never claimed to have an "express contract", which has been defined in Tennessee to be written agreements, stating the agreed terms. *V. L. Nicholson Co.* v. *Transcon Inv. and Financial Ltd., Inc.* (1980)

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[4]The full text of applicable section is printed on Page 24 of Appendix.
[5]The full text of applicable section is printed on Page 25 of Appendix.
[6]The full text of applicable section is printed on Page 26 of Appendix.

595 S.W.2d 474. An "express" contract and an "implied" contract have been distinguished as follows:

> "In Tennessee, an express contract is created by the parties' actual assent to mutually acceptable terms expressed in words or other suitable mode; conversely, a contract implied in law is imposed by operation of law, without regard to the assent of the parties, on grounds of reason and justice." *Continental Motel Brokers, Inc.* v. *Blankenship.* (1984) 739 F.2d. 226.

Therefore, if allowed to stand, The University of Tennessee at Martin promotes the policy of refusing to consider and/or honor contracts implied by law, regardless of the provisions of such or whether such create due process rights under the United States Constitution.

The Personnel Policies and Procedures Manual creates a property right protected under the Fourteenth Amendment to the United States Constitution.

The Manual authorized and approved seven (7) instances of the termination of employment, whether voluntary or involuntary.[7] The termination of Petitioner's employment was in category number 2, "Discharge", which is defined as being "for cause",[8] and the Manual further directed that extreme care should be taken to protect all parties. [9]

The Manual also required that additional written explanation would be given, and that proper procedures had to be followed.[10]

On the employee evaluations made by Petitioner's supervisors of him from a period of time from March 28,

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[7]The full text of applicable section is printed on Page 32 of Appendix.
[8]The full text of applicable section is printed on Page 22 of Appendix.
[9]The full text of applicable section is printed on Page 27 of Appendix.
[10]The full text of applicable section is printed on Page 28 of Appendix.

1977, through April 1, 1982, such clearly indicate that he was a most satisfactory employee. In fact, on the April 1, 1982, and the two (2) previous evaluations, he had none less than "Above Average" and "Excellent".[11]

His termination letter in 1983 was a two (2) sentence letter giving him no specifics as to alleged wrongs.

The Manual also required that any employee whose work was inadequate was to be given written warnings describing the specific areas of inadequacy, corrective actions expected, and the time period for such to be accomplished.[12]

Petitioner was never given a specific time period to correct anything.[13]

All of the directions, instructions, policies and procedures of Respondent's Manual establish a protected property interest. In the case of *Wells* v. *Dallas Independent School District*, (1983) 576 F. Supp. 497, a similar property interest was discussed, holding that a provision in a personnel guide stating that the employer could discharge for cause, created a protected property interest, even in the absence of a written contract.

In this case, Petitioner was discharged for what was classified as "cause", but was denied the following: (a) additional written explanations at time of his termination; (b) a "pre-termination hearing"; (c) a confrontation of specific charges or the specific accusers relied upon by his supervisor in making the decision to terminate his employment; (d) a "stay" of his discharge, pending administrative "review", (e) written responses from the "normal chain of command" reviewing his termination, stating specific facts and events supporting approval of his termination;

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[11]See Record, Tennessee Supreme Court, pp. 34/40.

[12]The full text of applicable section is printed on Page 29 of Appendix.

[13]See Record, Tennessee Supreme Court pp.111/112.

and, (f) specific reasons from anyone stating facts and events for his termination.

A contrast develops where a state employee may be discharged "at will" and therefore, under state law, has no property interest in his job, but a state employee whose employment may be terminated only for "cause", does have a property interest in such employment, and is entitled to due process protection. *Thompson* v. *Bass* (1980 CA5 ALA), 616 F2d 1259, Cert. denied 449 U.S. 983, 66 LEd 2d 245, 101 S.Ct. 399.

Since Respondent's rules limited termination under the "discharge" category to be only for "cause", Petitioner had a reasonable right to expect continued employment. *Perkins* v. *Board of Directors of School Administrative Dist.* (1982 CA1 ME) 686 F2d 49.

It has been long held that neither a state nor any of its agencies can disregard the prohibitions of the Fourteenth Amendment, and that an individual is protected against arbitrary actions of government. *Georgia Power Co.* v. *Decatur* (1930) 281 U.S. 505, 74 L.Ed 999, 50 S. Ct. 369, and *Wolff* v. *McDonnel* (1974) 418 U.S. 539, 41 L.Ed 2d 935, 94 S.Ct. 2963.

To allow Respondent to disregard its own rules, policies and procedures, violates the basics of Due Process.

Such basics were discussed by this Court in the case of *Cleveland Board of Education* v. *Loudermill*, (1985) 470 U.S. 532, 84 L.Ed 2d 494, 105 S.Ct. 1487, especially as to the desirability of a pre-termination hearing, and clarified certain employment rights under this type of case.

Although longevity and faithful, competent years of service are not considered by the Respondent, Petitioner should not be prohibited from being able to avail himself of such basic rights as notice, opportunity to be heard,

pre-termination hearing, and opportunity to respond. This is also affirmed in the *Wells* decision supra.[14]

CONCLUSION

Petitioner therefore submits that the doctrine of sovereign immunity should not be allowed to deny the Petitioner his Contitutional rights as described herein, and the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

HARRY MAX SPEIGHT
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[14]The full text of applicable section is printed on Page 31 of Appendix.

CERTIFICATE OF SERVICE

I, HARRY MAX SPEIGHT, attorney for Raymond Stokes, Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on December _____, 1987, I served a copy of the foregoing Petition for Writ of Certiorari on The University of Tennessee at Martin, Respondent, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Beauchamp E. Brogan, Esq, attorney of record for Respondent at General Counsel, The University of Tennessee, 810 Andy Holt Tower, Knoxville, Tennessee 37996-0184.

Dated December _____, 1987.

_____
HARRY MAX SPEIGHT
Attorney for Petitioner

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(901) 364-2010

APPENDIX

IN THE CHANCERY COURT OF WEAKLEY COUNTY, TENNESSEE

RAYMOND STOKES, Plaintiff,	)	
vs.	)	Civil Action No. 8816
THE UNIVERSITY OF TENNESSEE AT MARTIN, Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause was further heard upon defendant's Motion for Summary Judgment on the ground that this action is barred by the doctrine of sovereign immunity, T.C.A. §20-13-102, and for the additional reason that the Complaint, as amended, and plaintiff's response to said motion, the pleadings herein and the argument of counsel, from all of which it appears that defendant's motion should be granted.

It is therefore ORDERED, ADJUDGED AND DECREED that defendant's Motion for Summary Judgment be, and the same hereby is, granted.

Enter this 20 day of October, 1986.

HOMER W. BRADBERRY

APPROVED FOR ENTRY

HARRY MAX SPEIGHT
Attorney for Plaintiff
RONALD C. LEADBETTER
Attorney for Defendant.

Filed October 20, 1986

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

RAYMOND STOKES, Plaintiff-Appellant,	)	
vs.	)	WEAKLEY EQUITY NO. 4
THE UNIVERSITY OF TENNESSEE AT MARTIN, Defendant-Appellee.	)	

ORDER

This matter came on to be regularly considered by the Court, on the record, and for the reasons stated in the Court's Opinion, of even date, it is ORDERED that:

1. The judgment of the trial court is affirmed and this case is remanded for such further proceedings as necessary.

2. Costs are assessed against the plaintiff-appellant for which execution may issue, if necessary.

J. CRAWFORD
P.J. TOMLIN, W.S.
J. FARMER
Date Filed June 19, 1987

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

RAYMOND STOKES, Plaintiff-Appellant,	)
vs.	)
THE UNIVERSITY OF TENNESSEE AT MARTIN, Defendant-Appellee	)

OPINION

Filed: June 19, 1987

This is an employee discharge case. Plaintiff, Raymond Stokes, appeals from the order of the trial court granting summary judgment to defendant, University of Tennessee at Martin (UTM).

Plaintiff's complaint, as amended, alleges that he was first employed by UTM on September 1, 1967, and was employed by UTM as Associate Director of Financial Aid until December 31, 1983. He avers that by letter of November 29, 1983, Randall Hall, Director of Financial Aid, advised him that his employment was being terminated as of December 31, 1983, because of inadequate work performance. He alleges that his termination was arbitrary and capricious and without sound basis, that by virtue of the personnel policies of UTM he had an expectancy of continued employment and could only be discharged for cause. He avers that he has been deprived of his property right in continued employment without due process and in violation of the United States Constitution. He further alleges that UTM violated 42 U.S.C. §1983 which provides as follows:

> §1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

UTM answered the complaint and then filed a motion for summary judgment on the ground that the action was barred by the doctrine of sovereign immunity and on the ground that plaintiff failed to state a claim upon which relief can be granted. Plaintiff has appealed and presents four issues for review.

The first issue is whether the trial court erred in holding

that plaintiff's action is barred by the doctrine of sovereign immunity.

Article I, Sec. 17 of the Constitution of Tennessee provides:

> Sec. 17. Open courts — Redress of injuries — Suits against the State. — That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

T.C.A. §20-13-102 provides:

> 20-13-102. Actions against state prohibited. (a) No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.
>
> (b) No statutory or other provision authorizing the University of Tennessee and its board of trustees to sue and be sued shall constitute a waiver of sovereign immunity.

Plaintiff's suit was filed in Weakley County on May 18, 1984. At the time the suit was filed, T.C.A. §29-10-101(a)(1) was in full force and effect and provided:

> 29-10-101. Jurisdiction. — (a)(1) The several circuit and chancery courts of Davidson County, Tennessee, shall, subject to appeal as provided by law, have jurisdiction to enter judgments against the state founded upon any express contract or breach thereof with the state and

> shall determine all questions of fact involved without the intervention of a jury, subject to the limitations of this chapter.

Plaintiff contends that T.C.A. §29-10-101(a)(1) is not applicable to him and that Weakley County is the proper forum for this suit because he is suing on an implied contract and not an express contract. Therefore, we will consider the case premised on plaintiff's concession that his suit is based on an implied contract of employment as opposed to an express contract of employment. In *University of Tennessee* v. *Peoples Bank*, 157 Tenn. 87, 6 S.W.2d 328 (Tenn. 1928), our Supreme Court held that the University of Tennessee by incorporating did not lose the attribute of sovereignty. Moreover, the legislature made it quite clear in T.C.A. §20-13-102(b), quoted above, that it intended for the University of Tennessee to be clothed with sovereign immunity. It is well established that the University of Tennessee is not a "person" amenable to suit under 42 U.S.C. 1983. See *Gross* v. *University of Tennessee*, 448 F. Supp. 245 (W.D. Tenn. 1976) aff'd 620 F.2d 109 (6th Cir. 1980).

Plaintiff argues that his suit is not barred by the doctrine of sovereign immunity because he seeks injunctive relief. We quote from his brief:

> This case was not one brought for damages within the purpose and intent of T.C.A. §20-13-102. The relief sought by Plaintiff was for reinstatement of his employment, benefits, and back-pay, and was in the nature of equitable or injunctive relief, **not** damages. (Emphasis supplied.)

Plaintiff apparently misreads T.C.A. §20-13-102, because we find nothing in the statute referring to a suit for "damages." The statute is quite explicit in prohibiting any suit "with a view to reach the state, its treasury, funds or property." Clearly plaintiff's suit seeking reinstatement, back-pay, employment benefits, and attorney's fees, comes

within the purview of the statute, T.C.A. §29-10-101(a)(1)[1] waiving immunity, relates only to express contracts and specifically provides for suits thereon in the courts of Davidson County, Tennessee. A statute permitting suit against the state under authority of Article 1, Sec. 17 of the Constitution of Tennessee must be strictly construed and the jurisdiction cannot be enlarged by implication. *Hill* v. *Beeler*, 199 Tenn. 325, 286, S.W.2d 868 (1956). Even if plaintiff's Weakley County suit were premised on an express contract, this statute mandates a dismissal.

The trial court was correct in holding that plaintiff's suit was barred by virtue of sovereign immunity. Accordingly, the judgment of the trial court is affirmed and this case is remanded for such further proceedings as are necessary. Costs of the appeal are assessed against the appellant. We pretermit consideration of the other issues presented.

J. CRAWFORD

CONCUR:

P.J. TOMLIN, W.S.
J. FARMER

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[1]This statute was repealed effective January 1, 1985, by 1984 Tenn.Pub.Acts Ch. 972, which established the Tennessee Claims Commission.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

RAYMOND STOKES,
Plaintiff/Appellant,

vs. Weakley Equity

THE UNIVERSITY OF
TENNESSEE AT MARTIN,
Defendant/Appellee.

ORDER

Upon consideration of the application for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be and the same hereby is denied at the cost of appellant.

PER CURIAM

Date Filed: September 8, 1987

THE UNIVERSITY OF TENNESSEE PERSONNEL POLICY ON DISCHARGE

1. Discharge. This is an action initiated by the employer to terminate an employee for cause. Such terminations will strictly adhere to the University Disciplinary Policy and Procedures. The discharge of a staff member is an action to be taken with extreme care to assure protection to all parties concerned. Supervisors are expected to contact their campus or unit Personnel Department prior to discharging any employee to ensure that such action is appropriate and consistent with University policy.

PORTIONS OF COMPLAINT WHICH RAISE FEDERAL QUESTIONS

"12. Plaintiff alleges that the actions of the Defendant and its employees in terminating the employment of Plaintiff were arbitrary, capricious, without sound basis, and in violation of the Rules and Regulations of Defendant, resulting in the financial detriment of Plaintiff. Plaintiff further alleges that he had the valid expectancy of continued employment with Defendant, subject to being terminated only with the provisions of the published and established policies of Defendant."

"13. Plaintiff has been deprived of his property right in continued employment and liberty right in being free from unjust accusations of incompetency, without the process due and the procedures required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Defendant's own personnel policy rules and regulations as set forth in its Personnel Policies and Procedures Manual. These violations occurred in the following ways. . ."

"15. Plaintiff alleges that he has suffered a deprivation of the rights, privileges and immunities secured by the Constitution of the United States and the regulations of the Defendant under the definitions of 42 U.S.C.S. 1983."

TENNESSEE CONSTITUTION
Article 1, Section 17

"Sec. 17. Open Courts — Redress of injuries — Suits against the state. — That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."

TENNESSEE CODE ANNOTATED
Section 29-10-101

"29-10-101. Jurisdiction. — (a)(1) The several circuit and chancery courts of Davidson County, Tennessee, shall, subject to appeal as provided by law, have jurisdiction to enter judgments against the state founded upon any express contract or breach thereof with the state and shall determine all questions of fact involved without the intervention of a jury, subject to the limitations of this chapter."

TENNESSEE CODE ANNOTATED
Section 20-13-102

"20-13-102. Actions against state prohibited. (a) No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

"(b) No statutory or other provision authorizing the University of Tennessee and its board of trustees to sue and be sued shall constitute a waiver of sovereign immunity."

PERSONNEL POLICY — 160

"When termination of employment becomes necessary, whether employee or employer initiated, **proper procedures must be followed to assure equitable treatment to all parties. Termination from the University of Tennessee shall be officially documented in such a manner as to establish a clear record of action, both as a service to the terminating employee and to the University.**" (emphasis added)

THE UNIVERSITY OF TENNESSEE
PERSONNEL POLICY 160-Po3

Discharge

205* Failure to follow clear instructions
(Inadequate work performance)

*Additional written explanation will be required.

THE UNIVERSITY OF TENNESSEE AT MARTIN
PERSONNNEL PROCEDURE

DISCIPLINARY ACTIONS

The following multi-step disciplinary procedures will be followed for the purpose of correcting inadequate work performance or improper job behavior.

I. Inadequate Work Performance: refers to failure to properly carry out employment responsibilities. Corrective disciplinary action taken because of inadequate work performance may not be appealed for a hearing.

A. During the probationary period, a non-exempt employee whose work performance is inadequate is subject to discharge without recourse. The supervisor must notify the employee in writing of discharge prior to the last day of work (see Personnel Policy and Procedure #135).

B. Temporary employees whose work performance is inadequate are subject to discharge without recourse (see Personnel Policy and Procedure #135).

C. The following steps of progressive discipline are used for regular employees.

1. The supervisor must warn the employee orally of the areas of job performance which are inadequate. The employee should be counseled by the supervisor regarding necessary corrective actions. Documentation should be maintained by the supervisor of the reasons for the oral warning and of the substance and date of this discussion.

2. If the inadequate work performance continues, the supervisor must warn the employee in writing referencing the specific area(s) of inade-

quate work performance, the corrective actions expected of the employee, and the time period for accomplishing corrective actions. The warning should also include a statement that if the specific area(s) of work performance are not corrected within the specified time period, the employee may be subject to disciplinary action including suspension or discharge. A sample written warning notice (Per 17) follows this procedure.

3. If the specific area(s) of work performance do not improve within the specified time period, the supervisor may suspend the employee without pay for a period of time or discharge the employee. The supervisor must notify the employee in writing of the action taken, the reasons for the action, the time period of suspension or the discharge date, and the amount of annual leave due in the case of discharge. In the case of discharge, the employee should schedule an exit interview with the Office of Personnel Services. In the case of discharge, the supervisor should complete the PAF and attach written documentaion (such as letters of warning), a copy of the letter of discharge, and the employee's leave record form or time report. Forward the materials to the Office of Personnel Services immediately.

Wells v. **Dallas Independent School District,**
(1983) 576 F. Supp. 497
Pages 540-5

"The DISD failed to provide Wells with written notice of termination and an effective opportunity to rebut the reasons for termination before termination of Wells' employment became effective. The conclusion is therefore inescapable that the school district denied Wells pre-termination due process.

"Anticipating the court's ruling in this regard, the defendants argue that failure to afford minimal pre-termination procedures is of no consequence because post-termination notices and hearings cured any due process deficit.

"It is evident, therefore, that even if this court should determine that the Board of Trustees provided post-termination procedures which complied with procedural due process, the use of the word 'cure' merely confuses the issue. Such a cure does not eradicate the initial violation, nor eliminate a right to any damages thereby incurred, although it does offer the discharged employee an opportunity to vindicate himself and the governmental body an opportunity to retract the decision to discharge."

THE UNIVERSITY OF TENNESSEE PERSONNEL POLICY ON TERMINATION

Termination Categories:

1. Resignation.
2. Discharge.
3. Reduction-In-Force.
4. Death.
5. Non-reappointment.
6. Retirement.
7. Student Termination.

(2)

Supreme Court, U.S.
FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1026

In the Supreme Court of the United States

OCTOBER TERM, 1987

RAYMOND STOKES,
Petitioner,

vs.

THE UNIVERSITY OF TENNESSEE AT MARTIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Did the Tennessee Court of Appeals for the Western Section Correctly Hold Petitioner's 42 U.S.C. § 1983 Action to Be Barred by the Doctriine of Sovereign Immunity and Did the Tennessee Supreme Court Correctly Deny Petitioner's Application for Permission to Appeal From That Judgment?

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No. 87-1026

In the Supreme Court of the United States

OCTOBER TERM, 1987

RAYMOND STOKES,

Petitioner,

vs.

THE UNIVERSITY OF TENNESSEE AT MARTIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

On May 18, 1984, petitioner filed a complaint in the Weakley County, Tennessee Chancery Court against respondent, The University of Tennessee at Martin[1] ("University") challenging the University's decision to terminate his employment and seeking reinstatement, benefits, back pay and attorney fees. The circumstances surrounding the termination are unimportant for purposes of this appeal. The complaint, as later amended, alleged

1. The University of Tennessee at Martin is a branch of The University of Tennessee, Tennessee Code Annotated § 49-9-1001, which is in turn an agency of the State of Tennessee. *Jain v. University of Tennessee at Martin*, 670 F. Supp. 1388 (W.D. Tenn. 1987); *Firemen's Fund Ins. v. Bell Helicopter Textron*, 667 F. Supp. 583, 584 (E.D. Tenn. 1987); *Carlson v. Highter*, 612 F. Supp. 603, 604, 605 (E.D. Tenn. 1985).

a violation of petitioner's due process right under the Fourteenth Amendment to the United States Constitution and a cause of action under 42 U.S.C. § 1983.

The University subsequently filed a motion for summary judgment which asserted, in part, that petitioner's action was barred by the doctrine of sovereign immunity, Tennessee Code Annotated § 20-13-102.[2] On October 20, 1986, the Chancery Court granted the University's motion, finding, inter alia, that petitioner's action was indeed barred by the doctrine of sovereign immunity.

Following petitioner's appeal of the trial court's order, the Court of Appeals for the Western Section of Tennessee affirmed the judgment of the trial court on the ground that petitioner's action was barred by the doctrine of sovereign immunity. *Stokes v. The University of Tenn. at Martin*, 737 S.W. 2d 545 (Tenn. App. 1987).

Subsequently, petitioner applied to the Tennessee Supreme Court for permission to appeal the judgment of the Court of Appeals. That application was denied by order of the Tennessee Supreme Court on September 8, 1987.

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2. Tennessee Code Annotated § 20-13-102 provides:

Actions against state prohibited.

(a) No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

(b) No statutory or other provision authorizing the University of Tennessee and its board of trustees to sue and be sued shall constitute a waiver of sovereign immunity.

Petitioner now appeals the order of the Tennessee Supreme Court, claiming that "[I]f the decisions of the courts below are allowed to stand, petitioner could never have a forum to protect his constitutional rights." [*Petition for Writ of Certiorari* at p. 6.]

ARGUMENT

The Tennessee Court of Appeals for the Western Section Correctly Held Petitioner's 42 U.S.C. § 1983 Action to Be Barred by the Doctrine of Sovereign Immunity and the Tennessee Supreme Court Correctly Denied Petitioner's Application for Permission to Appeal From That Judgment

It should be observed that petitioner does not contest the University's status as an agency of the State of Tennessee which, as an arm or alter ego of the state, possesses the state's sovereign immunity. See *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). Likewise, petitioner does not contend that the courts below erroneously applied existing state law to the case at bar. Quite to the contrary, petitioner acknowledges that Article 1, Section 17 of the Tennessee Constitution permits suits against the State of Tennessee only as the legislature may direct, that Tennessee Code Annotated § 20-13-102 expressly prohibits lawsuits against the University and that, as a result, Tennessee law prohibits petitioner from suing the state. [*Petition for Writ of Certiorari* at pp. 6-7.][3] In essence,

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3. Petitioner also contends that the University violated provisions of its Personnel Policies and Procedures Manual which set forth employee rights to which he was entitled. However, this issue was not addressed by the Tennessee appellate courts and has no bearing on the resolution of the sovereign immunity issue.

petitioner asks this court to abolish the doctrine of sovereign immunity in order that he might pursue his constitutional claims directly against the University. The premise on which petitioner's prayer for relief rests is completely erroneous.

At the outset, it should be noted that the doctrine of state sovereign immunity is one which has been long recognized and fully accepted by this court. See *Green v. Mansour,* ..... U.S. ....., 106 S. Ct. 423, 425 (1985); *Atascadero State Hospital v. Scanlon,* ..... U.S. ....., 105 S. Ct. 3142, 3145 (1985); *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 98 (1984); *Quern v. Jordan,* 440 U.S. 332, 342-45 (1979). In *Atascadero,* the court reiterated that it is the fundamental principle of sovereign immunity that limits the grant of judicial authority to the federal courts and listed numerous cases wherein this court has upheld the sovereignty of the state and its immunity from suit. 105 S. Ct. at 3148 n. 3.

Petitioner seeks to circumvent the jurisdictional bar imposed by the Tennessee state courts' adherence to the doctrine of sovereign immunity by seeking relief from this court. However, such attempt to secure through the federal courts that which petitioner is barred from obtaining through the Tennessee state courts succumbs to the clear constraint imposed on the federal courts by the Eleventh Amendment to the United States Constitution:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against the United States by citizens of another state or by citizens or subjects of any foreign state.

This court has consistently held that an unconsenting state is immune from suits brought in the federal courts by her own citizens as well as by citizens of another state. *Edelman v. Jordan,* 415 U.S. 651, 662-63 (1974). See also *Atascadero State Hospital,* 105 S. Ct. at 3145, 3147-48; *Pennhurst School & Hospital,* 465 U.S. at 98-99; *Cory v. White,* 457 U.S. 85 (1982); *Quern v. Jordan,* 440 U.S. 332, 337 (1978); *Alabama v. Pugh,* 438 U.S. 781, 782 (1978). The court has specifically held Eleventh Amendment immunity to apply to constitutional claims brought against the state pursuant to 42 U.S.C. § 1983. For example, see *Quern,* 440 U.S. at 339-40; *Pugh, supra; Edelman, supra.*

The State of Tennessee has not consented to be sued under the Fourteenth Amendment or 42 U.S.C. § 1983 in either the state or federal courts, but, instead, has expressly stated its will that no court in the state has authority to entertain suits against the State of Tennessee. Tennessee Code Annotated § 20-13-102. Such bar is expressly extended to suits against The University of Tennessee. *Id.* No exception whatever is made for suits alleging constitutional violations or suits brought pursuant to 42 U.S.C. § 1983.

Petitioner offers no authority whatever for the proposition that sovereign immunity or Eleventh Amendment immunity does not or should not apply in a case where a complainant pursues an action alleging deprivation of constitutional rights including those guaranteed by the Fourteenth Amendment. Nothing more is offered than petitioner's bare assertion that, should this court affirm the sovereignty of the State of Tennessee, petitioner will never have a forum in which to protect his constitutional

rights. Not only does petitioner fail to cite any authority in support of his conclusion, but the conclusion flies directly in the face of abundant authority to the contrary. For example, this court has long and consistently held that state officials who violate clearly established constitutional rights are not immune from suit for damages or other relief. For example, See *Anderson v. Creighton,* ..... U.S. ....., 107 S. Ct. 3034, 3038 (1987); *Green,* 106 S. Ct. at 426; *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985); *Davis v. Scherer,* 468 U.S. 183, 191 (1984); *Edelman,* 415 U.S. at 676-77; *Greenwood v. Peacock,* 384 U.S. 808, 829-30 (1966). State officials have specifically been held subject to prospective injunctive relief. For example, *Green,* 106 S. Ct. at 426; *Quern,* 440 U.S. at 339; *Edelman,* 415 U.S. at 677.

In a nutshell, at the time petitioner commenced this action he had the right to proceed in an action seeking damages or other relief against any University official shown to have violated petitioner's clearly established constitutional rights, but he failed to do so. Petitioner's failure to pursue an available remedy does not warrant reversal of this court's longstanding support of the doctrine of sovereign and Eleventh Amendment immunity.

CONCLUSION

For the foregoing reasons, petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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